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IN THE

Supreme Court of the United States

No. 305

WALTER W. BURNS,

Petitioner,

vs.

OLIVER L. SPILLER, STEWART M. GRAYSON, ARLINGTON A. McCALLUM, LeROY S. MANN, *et al.*,

Respondents.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WALTER W. BURNS,
Petitioner.

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SUBJECT INDEX.

PAGE

Summary and Short Statement of Matter Involved 1
Statement of Basis for Jurisdiction 4
The Questions Presented 9
Reasons Relied on for the Allowance of the Writ 10

TABLE OF AUTHORITIES RELIED ON.

Cases.

DeArnaud v. Ainsworth, 24 App. D. C. 167; 32 Wash. Law Rep. 662 4
Dinsman v. Wilkes, reported in 7 Howard 89 and 12 Howard 390 ..... 7, 8, 11

Statutes.

Section 240(a) of the Act of February 13, 1925, Chapter 229, 43 Stat. 936 4
Soldiers' and Sailors' Civil Relief Act of 1940, as amended 11
Sec. 5, Section 205 12
Soldiers' and Sailors' Civil Relief Act of 1941, (Approved October 17, 1940), Sec. 205 12

Miscellaneous.

Articles I, II and VI of the Amendments to the Constitution of the United States 7, 11
Federal Rules of Civil Procedure 9
Rule 8(a) 7, 10

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PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner, Walter W. Burns, petitions this Court for review on writ of certiorari of a decision of the United States Court of Appeals for the District of Columbia in the above-entitled cause, made on March 4, 1947, the petition for rehearing having been denied on May 29, 1947.

Summary and Short Statement of Matter Involved.

The petitioner was a Colonel on active duty in the Army of the United States. The respondents were also officers in the Army of the United States, the respondent Spiller being a Brigadier General, and therefore ranking the remainder of the respondents, and the petitioner.

The complaint sets forth that the respondents did wrongfully and maliciously conspire to and did unlawfully have petitioner incarcerated in William Beaumont General Hospital, at El Paso, Texas.

The complaint further sets forth that the respondents did maliciously and wrongfully, after being told by the hospital authorities, that there was nothing mentally wrong with the petitioner, submit false reports about petitioner, the respondents having full knowledge that the reports submitted were false, these reports being submitted for the purpose of prolonging the false imprisonment of the petitioner, which reports did actually prolong the false imprisonment of the petitioner and respondents did order subordinates to "get him (petitioner) on something" or words of like import. (Joint App. 3.)

The complaint further sets forth that the respondents did issue and cause to be issued malicious and unlawful military orders preventing persons under military jurisdiction from talking or otherwise communicating with the petitioner, which orders have not to this time been revoked, vacated or rescinded. (Joint App. 3.)

The complaint sets forth that the respondents did conspire to threaten petitioner and cause petitioner to be threatened with a Class "B" efficiency board unless petitioner would cease attempting to have himself declared of sound mind by the Medical Authorities of William Beaumont General Hospital, El Paso, Texas. (Joint App. 4.)

The complaint sets forth that the respondents did cause to have a meeting of petitioner's officers at which, with respondent Mann in charge, did have respondent McCallum speak falsely and maliciously against petitioner stating

that petitioner had committed a terrible crime. (Joint App. 4.)

The complaint sets forth that the respondents did maliciously conspire to have petitioner put off of active duty with the Army of the United States on the ground that petitioner had high blood pressure (Joint App. 5.)

The complaint sets forth that the respondents did have a false and malicious report published that the petitioner did perform a "solo" dance. (Joint App. 5.)

The complaint sets forth that the respondents did cause to be issued a malicious and illegal written order forbidding petitioner to speak to certain civilians in the City of El Paso, Texas, and in the order recognized that there was a question as to the validity of the order under the Constitution of the United States, which written order did not permit the questioning of the validity of the order by petitioner at the time of the issue of the order but only at a future time. (Joint App. 5.)

The complaint sets forth that the respondents did conspire with malicious threats against petitioner to give him a secret trial without sufficient time to defend himself, unless the petitioner should resign from the Army of the United States, at the same time preventing the petitioner from obtaining information which might have helped petitioner to defend himself. (Joint App. 6.)

The complaint also sets forth that the respondents did maliciously and wrongfully interfere with the properly addressed first-class mail of the petitioner by opening same, and did prevent delivery of some of said mail to petitioner. (Joint App. 6.)

Statement of Basis for Jurisdiction.

Authority for jurisdiction of the Supreme Court of the United States in the matter of this petition is found in Section 240(a) of the Act of February 13, 1925, Chapter 229, 43 Stat. 936, reading as follows:

> "Sec. 240 (a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The reasons why it is submitted that the Supreme Court of the United States should review this cause are as follows:

1. The questions involved are of general importance. These are whether the statements and acts of officers of the United States are privileged, even though such statements or acts are malicious.

(a) In support of this point, your petitioner states that he attempted to employ the best known lawyer on military matters and was told by this lawyer that he had had over forty officers seek his services where apparently no one of them was insane yet had been so charged by a superior officer; that he had informed them all that the courts of the District of Columbia would hold that all acts of officers of the United States were privileged under the case DeArnaud v. Ainsworth, 24 App. D. C. 167; 32 Wash. Law Rep. 662.

(b) Your petitioner states that he has had nearly 200 somewhat similar cases called to his attention, this being due in part to the publicity given by the newspapers to the instant case. Some of the cases which petitioner has had time to investigate are as follows:

(1) A lieutenant called in by his commanding officer, was told he had been accused of a terrible crime; the Colonel refusing either to name the accusors or the criminal act, held the lieutenant incommunicado not only until he resigned but until the resignation had been accepted. The lieutenant was refused permission to enlist in the U. S. Service. He enlisted in the Canadian Army and fought in Germany until surrender.

(2) The Chaplain of the aforementioned lieutenant was ordered by the Commanding Officer to not speak to the lieutenant. The Chaplain insisted upon doing so and was then given a Class "B" reclassification board and was put out of the Army. This cost him his church and he had to accept employment making blue prints for a living.

(3) A National Guard officer was separated from the active service under honorable conditions, and although in a retired status, was a civilian instructor in military subjects at a university. A Regular Army officer who disliked the National Guard officer on hearing of this, got in touch with the University and informed them that their instructor was "not a fit person to be on a University faculty." The instructor's resignation was demanded at once, despite the fact that the instructor's name was supplied at the War Department. The National Guard officer (retired) is your petitioner.

(4) A recent West Point graduate, a major, had never even talked with his commanding general although he was on his general's staff. The young man did something he be-

lieved he had a right under regulations to do but it offended the General. The General without any hearing placed him in a neuro-psychiatric ward and the doctor whose efficiency reports passed over the general's desk, approved the general's charge of the Major having an unsound mind and the Major was put off of active duty. The Major wrote your petitioner that his General was General Spiller.

(5) A nurse with rank of lieutenant refused to be a "GI Wife" for the duration and cohabit with the officers. She was placed in a neuro-psychiatric ward and the psychiatrist—a medical major was ordered to fix up a mental diagnosis on her. He came to the lieutenant with his chief nurse and informed her that her colonel had ordered him to make the diagnosis. He informed her he would not do so and sent her back to the States.

(6) A Medical Officer with rank of Lieut. Col., in charge of a medical unit overseas was ordered to watch and report progress on the structures being put up nearby, it being understood that on completion of the new construction, his unit was to occupy the structures. At first, he was able to report real progress being made. Later, a new construction battalion was sent to take over the construction. The Medical Officer then had to report that not much progress was being made. He was told repeatedly by his superior that reports of *progress* were desired. As the Medical Officer had no authority over the battalion doing the construction, he felt that he had to report the truth. After being several times criticized for not reporting progress, he was placed in a psychiatric ward and for about two years was forced to fight for a favorable ruling on his sanity, which he finally obtained. In the meantime, his services were a dead loss to the Government.

2. The United States Court of Appeals for the District of Columbia made its decision on a point which had been

raised in the District Court but the opinion of the lower court was not based on that point—that the amended complaint did not comply with Federal Rules of Civil Procedure, Rule 8(a) which requires that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

3. The United States Court of Appeals omitted to pass on either one of the two points upon which the appeal was taken; these being the two points on which the lower court based its opinion. These are as follows:

(a) the statements against petitioner were privileged.

(b) the statements are barred by the statute of limitations. (Joint App. 9.)

By refusing to pass upon these points, your petitioner was denied any right of appeal which he might have had to appeal from any holding on petitioner's rights under Articles I, II and VI of the amendments to the Constitution of the United States.

The refusal of the United States Court of Appeals for the District of Columbia to pass upon the points upon which the appeal was taken, it is submitted, is a departure from the accepted and usual course of judicial proceedings.

4. The following statement was made in the decision of the United States Court of Appeals for the District of Columbia:

> "Though it (the complaint) characterizes appellees' alleged conduct as wrongful, unlawful and malicious, it does not sufficiently disclose the conduct to enable a court to judge whether or not it was tortious."

This it is submitted is a failure to give proper effect to the law as laid down in the case of Dinsman v. Wilkes, reported in 7 Howard 89 and 12 Howard 390. In delivering

the opinion of the Supreme Court of the United States, Mr. Justice Woodbury said, 7 Howard 89, in part:

> "It is not lost sight of however, * * * that while the chief agent of the Government in so important a trust, when conducting with skill, fidelity and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction or inflicts private injury either from malice, cruelty or any species of oppression, founded upon considerations independent of public ends.
>
> "The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office."

The second time this same case came before the United States Supreme Court, in 12 Howard 390, Mr. Justice Taney, delivering the opinion of the court, had this to say, in part:

> "But at the same time, it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in the service to be oppressed and injured by his commanding officer from malice or ill will or the wantonness of power, without giving him redress in the courts of justice.
>
> "*The case turns on the motive* which induced Captain Wilkes to inflict the punishments complained of and *this question is one exclusively for the jury—to be decided by them upon the whole testimony* and the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:
>
> "If they believe from the whole testimony that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindicative feeling to-

wards him, on the part of Captain Wilkes or by a disposition to oppress him, then the plaintiff is entitled to recover." (Italics mine.)

It is submitted that under the above decision, the Court of Appeals for the District of Columbia made its decision in conflict with a decision of the Supreme Court of the United States and that since the Federal Rules of Civil Procedure prevent the inclusion of needless details, it is only necessary for the act to be set forth together with the allegation of malice on the part of the defendants-respondents.

The Questions Presented.

1. Whether or not the amended complaint (Joint App. 1) sufficiently sets forth allegations of tortious acts to support a cause of action.

2. Whether or not such acts as alleged in the amended complaint (Joint App. 1) are privileged when committed by Army Officers at a time when the Country is not at war.

3. Whether or not the statute of limitations ran in the cases of respondents Spiller and Mann who were on an active duty status in the Army of the United States from and at the time of the acts set forth, and until after the filing of the complaint.

4. Whether or not the statute of limitations ran in the cases of respondents Grayson and McCallum who were in an inactive status for more than one year prior to the filing of the complaint, in view of the fact that the petitioner was prevented from obtaining the necessary facts to support a complaint, due to the malicious and unlawful orders issued by respondents preventing those in the military service from talking to petitioner.

5. Whether or not the United States Court of Appeals for the District of Columbia properly held that the amended complaint did not comply with the Federal Rules of Civil Procedure, Rule 8(a) when the United States District Court did not so hold and therefore the holding was not appealed.

6. Whether or not the United States Court of Appeals for the District of Columbia properly refused to consider the two points upon which the appeal was taken: (a) whether the acts of the respondents were privileged and (b) whether the statute of limitations had run.

7. Whether or not the United States Court of Appeals for the District of Columbia properly held that though the complaint characterizes respondents' conduct as wrongful, unlawful and malicious, it does not sufficiently disclose the conduct to enable a court to judge whether or not it was tortious.

Reasons Relied on for the Allowance of the Writ.

1. The holding of the United States Court of Appeals for the District of Columbia that petitioner's amended complaint is defective under the Federal Rules of Procedure, Rule 8(a) when this position was not taken by the lower court, has deprived petitioner of his day in court as to this point.

2. The refusal of the United States Court of Appeals for the District of Columbia to pass on the points appealed upon: (a) whether the acts alleged are privileged and (b) whether the statute of limitations had run, deprives the petitioner of any rights he might have exercised to have considered the violation of petitioner's rights of free speech of having his mail reach him unopened and his right to an

open and fair trial under Articles I, II and VI of the Amendments to the Constitution of the United States.

3. The questions involved are of general importance, particularly in view of the present opposition to legislation to bring into being the much needed universal military training. It has been variously estimated—from the War Department records—that there may have been as many as up to 200,000 members of the army who have been unjustly treated in a manner similar to the treatment accorded the petitioner. Until the law is clarified, an inferior in rank is helpless in the hands of his commanding officer or commanding General.

4. The holding of the United States Court of Appeals, for the District of Columbia, it is submitted, is contrary to the holdings of the Supreme Court of the United States in the case of Dinsman v. Wilkes, reported in 7 Howard 89 and 12 Howard 390, as already pointed out.

5. The refusal of the United States Court of Appeals for the District of Columbia to pass on the two points appealed is a departure from the accepted and usual course of judicial proceedings.

6. Since the United States Court of Appeals for the District of Columbia refused to pass on the matter of the statute of limitations, the only decision on this matter is that of the United States District Court for the District of Columbia. This court held that the statute of limitations had run as to all of the respondents, Spiller, Grayson, McCallum and Mann, whereas, in accordance with the Soldiers and Sailors Civil Relief Act of 1940, as amended, the time under the statute as to respondents Spiller and Mann had not begun to run, because these respondents were still in the active service of the Army when the complaint was filed. That part of this act which is relevant, is as follows:

Sec. 5, Section 205 of such Act *(Soldiers' and Sailors' Civil Relief Act of 1940)* is amended to read as follows:

"Sec. 205. The period of Military service shall not be included in computing any period now or hereafter to be limited by any law, regulation or order for the bringing of any action or proceeding in any court, board, bureau, commission, department or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

Sec. 205 (as passed in the Soldiers' and Sailors' Civil Relief Act of 1941) (Approved October 17, 1940).

"Sec. 205. The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during such period of service."

Respectfully submitted,

WALTER W. BURNS,
Petitioner.